Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

STEPHEN RAYMOND DOMINICK,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit, distinguishing itself from the other circuits, continues to refuse to apply correctly this Court's standard governing motions for a certificate of appealability – *see Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Banks v. Dretke*, 540 U.S. 668 (2004); and *Tennard v. Dretke*, 542 U.S. 274 (2004) – by failing to analyze whether petitioner's habeas claim is debatable among jurists of reason, whether a court could resolve the issue in a different manner, and whether the issue is adequate to deserve encouragement to proceed further.

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PETITION FOR A WRIT OF CERTIORARI

Stephen Raymond Dominick respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The findings of fact and conclusions of law of the 282nd District Court of Dallas County (Appendix G) are not reported. The Order of the Texas Court of Criminal Appeals denying habeas corpus relief (Appendix F) is not reported. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge (Appendix E), the Order of the District Court denying habeas corpus relief (Appendix D), and the Final Judgment (Appendix C) are not reported. The Order of the District Court denying a certificate of appealability (Appendix B) is not reported. The Order of the Fifth Circuit denying a certificate of appealability (Appendix A) is not reported.

JURISDICTION

The Fifth Circuit denied a certificate of appealability on July 20, 2007. This petition is being filed within 90 days of that decision. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of . . . liberty . . . without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATUTORY PROVISION

Title 28, section 2253(c)(2) of the United States Code provides, in pertinent part, "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

A. Summary Of The Issue

This case offers this Court an opportunity to clarify the proper application of § 2253(c) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which bars appeal from a final order in a habeas corpus proceeding unless the district judge or a circuit judge issues a certificate of appealability (COA). A COA may issue only if the petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court has interpreted that language to mean that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the issues are adequate to deserve encouragement to proceed

further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Adjudication under a relatively open-ended standard like § 2253(c) will rarely yield an overt "split" among the circuit courts as a matter of law. Nonetheless, application of the COA standard may yield divergent tendencies in different jurisdictions, and in such instances this Court has stepped in to clarify the proper application of the standard. Three times in the last four years, this Court has reversed efforts by the Fifth Circuit to narrow drastically the range of cases in which a COA may issue. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Banks v. Dretke*, 540 U.S. 668 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004). In *Tennard*, for example, this Court chastised the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA." 542 U.S. at 283. The present case is the latest in a series of episodes in which the Fifth Circuit has resisted this Court's balanced interpretation of § 2253(c). This Court is presently considering the same issue regarding the Fifth Circuit's application of the COA standard in *Scott Lynn Taylor v. Nathaniel Quarterman*, Cause No. 06-1565 (filed May 23, 2007). Petitioner requests that this Court hold this case should it grant certiorari in *Taylor v. Quarterman*.

As the present case demonstrates, the Fifth Circuit continues to deviate from this Court's instructions in two respects. First, it seeks to avoid the implications of *Miller-El* and similar decisions by issuing a one-sentence, boilerplate, form order that summarily denies COA without explaining why the claim is not debatable among jurists of reason, why a court could not resolve the issue in a different manner, and why the issue is not adequate to deserve encouragement to proceed further. Second, its rejection of

petitioner's claim indicates that the Fifth Circuit continues to use COA determinations as an opportunity to decide the *merits* of the appeal, not simply to determine whether the claim is fairly debatable. In so doing, the Fifth Circuit ignores this Court's clear command in *Miller-El*.

Petitioner filed a federal habeas corpus petition alleging that he was denied due process of law because the prosecution suppressed evidence that it would give consideration to its key witness in exchange for his testimony and used perjured testimony denying that he would receive consideration. The Magistrate Judge concluded that the state court decision that there was no undisclosed plea agreement was not unreasonable. The District Court, with one exception, adopted the Magistrate Judge's Findings, Conclusions, and Recommendation and denied relief. It also denied a COA, as did the Fifth Circuit.

The Fifth Circuit erred in denying a COA and in continuing to refuse to apply this Court's standard of review correctly. Petitioner proved by clear and convincing evidence in the state habeas proceeding that the prosecutor and the witness's lawyer had informally agreed that the witness would receive consideration for his testimony; that the witness testified against petitioner and denied that there had been any discussions regarding consideration; that three months later the prosecutor dismissed one capital murder charge against the witness and reduced the other to robbery for a five-year, non-aggravated sentence; and that the witness's lawyer admitted to petitioner's counsel in a recorded telephone conversation that there had been a "handshake deal." Therefore, petitioner made a substantial showing of the denial of a constitutional right. The Fifth Circuit should have issued a COA. Its failure to do so and its refusal to apply the standard correctly

constitute an unacceptable departure from the usual course of judicial proceedings and conflict with relevant decisions of this Court. Accordingly, this Court should exercise its supervisory powers and grant certiorari.

B. Procedural History

Petitioner was indicted for capital murder in cause number F-97-3534-IS in the 282nd District Court of Dallas County. The State did not seek the death penalty. He pled not guilty. The jury convicted him, and he received an automatic life sentence on January 20, 1998.

The Fifth Court of Appeals of Texas affirmed petitioner's conviction in an unpublished opinion issued on November 17, 1999. The Texas Court of Criminal Appeals refused discretionary review on May 10, 2000. *Dominick v. State*, No. 05-98-148-CR (Tex. App. – Dallas 1999, pet. ref'd).

Petitioner's conviction became final on appeal on August 8, 2000, when the time expired to file a petition for a writ of certiorari. Represented by present counsel, he filed a state habeas corpus application on May 21, 2001. The district court, after conducting an evidentiary hearing, recommended that relief be denied. The Texas Court of Criminal Appeals denied relief without written order on April 27, 2005. *Ex parte Dominick*, No. WR-61,399-01 (Tex. Crim. App. 2005).

Petitioner filed a federal habeas corpus petition on June 22, 2005. The Magistrate Judge recommended that relief be denied on April 24, 2006. The District Court denied relief on May 11, 2006, and denied a COA on August 4, 2006.

Petitioner filed a motion for a COA in the Fifth Circuit on September 20, 2006, which was denied on July 20, 2007.

REASON FOR GRANTING THE PETITION

THE COURT OF APPEALS ERRED IN CONTINUING TO REFUSE TO APPLY CORRECTLY THIS COURT'S STANDARD GOVERNING MOTIONS FOR A CERTIFICATE OF APPEALABILITY BY FAILING TO ANALYZE WHETHER PETITIONER'S HABEAS CLAIM IS DEBATABLE AMONG JURISTS OF REASON, WHETHER A COURT COULD RESOLVE THE ISSUE IN A DIFFERENT MANNER, AND WHETHER THE ISSUE IS ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER.

A. The Background

Reginald Cardell, also charged with capital murder, testified that he was with petitioner at the scene of the murders and corroborated other testimony regarding the motive for the murders. He testified that the prosecution had made no promises nor had any discussions about consideration for his testimony.

Petitioner established by clear and convincing evidence in the state habeas corpus proceeding that prosecutor Tom D'Amore and Cardell's lawyer Michael Gregory had informally agreed that Cardell would receive consideration for his testimony. Cardell testified against petitioner and denied that there had been any discussions regarding consideration. Three months later, D'Amore dismissed one capital murder charge and reduced the

other to robbery for a five-year non-aggravated sentence. Gregory admitted to habeas counsel in a recorded telephone conversation that there had been a "handshake deal." The state habeas court conducted an evidentiary hearing and found that there was no agreement or understanding that Cardell would receive consideration for his testimony; that Gregory was not credible and had lied when he told habeas counsel that th re had been a "handshake deal"; and that Gregory testified truthfully at the hearing that there was no agreement. The Texas Court of Criminal Appeals denied relief without written order based on these findings.

Petitioner contended in the federal habeas corpus proceeding that the state court decision that there was no agreement or understanding that Cardell would receive consideration for his testimony constituted an unreasonable determination of the facts in light of the evidence presented. The Magistrate Judge concluded that the state court decision was not unreasonable and recommended that relief be denied. The District Court, with one exception, adopted this recommendation and denied relief and a COA.

Petitioner requested the issuance of a COA from the Fifth Circuit on the issue of whether the district court erred in holding that the state court decision that the prosecution did not suppress evidence that it would give consideration to its key witness in exchange for his testimony, and did not use his perjured testimony denying that he would receive consideration, was based on an unreasonable determination of the facts in light of the evidence presented.

In a one-sentence order, a circuit judge stated, "IT IS ORDERED that the appellant's motion for certificate of appealability is Denied."[1] The order did not state the constitutional claim or cite the standard of review, let alone explain why the claim is not debatable among jurists of reason, why a court could not resolve the issue in a different manner, and why the issue is not adequate to deserve encouragement to proceed further.

B. The COA Standard Of Review

An appeal from a district court's denial of a petition for a writ of habeas corpus where the petitioner's confinement results from a state court process requires that a district or circuit judge issue a COA. 28 U.S.C. § 2253(c)(1). A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A "substantial showing" means that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the issues are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *see also Barefoot v. Estelle*, 463 U.S. 880, 893, and n. 4 (1983) (announcing pre-AEDPA standard for issuance of certificate of probable cause, which Congress codified in 28 U.S.C. § 2253(c)).

This Court clearly articulated and reinforced the COA standard in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The COA determination requires an overview of the claims in the habeas petition, a general assessment of their merits,

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[1] The judge used a form order and hand-wrote, "Denied" (Appendix A).

and an examination of the District Court's application of the AEDPA to the claims; but the petitioner need not show that the appeal will succeed. *Id.* at 336-37. A "court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. Although a COA should not issue as a matter of course, petitioners should receive the benefit of "close calls," as it is "consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* A petitioner does not even have to prove that some jurists would grant habeas relief. *Id.* at 338. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that petitioner will not prevail." *Id.*

C. The Fifth Circuit Continuously Refuses To Apply The COA Standard Correctly.

The Fifth Circuit incorrectly applied the standard governing the issuance of a COA because it did not even generally assess the merits of petitioner's claim. Reasonable jurists could debate whether the state court decision that the prosecution did not suppress evidence and use perjured testimony was based on an unreasonable determination of the facts in light of the evidence presented. Neither the District Court nor the Fifth Circuit fully considered the substantial evidence developed at the evidentiary hearing in support of the claim. Both denied COA without explanation.

Petitioner's case is worthy of certiorari review because it demonstrates that the Fifth Circuit continues to refuse to apply correctly this Court's standard governing the

issuance of a COA. This Court has not had to admonish any other circuit for failing to apply this standard correctly, but on three occasions it has reversed the Fifth Circuit for failing to do so. In addition to *Miller-El*, this Court reversed the Fifth Circuit for denying a COA in *Banks v. Dretke*, 540 U.S. 668 (2004), and *Tennard v. Dretke*, 542 U.S. 274 (2004).[2] Indeed, in *Tennard*, this Court chastised the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA." 542 U.S. at 283.

Perhaps in response to these reversals, the Fifth Circuit now frequently issues boilerplate form orders that summarily deny COA without explaining why the claim is not debatable among jurists of reason, why a court could not resolve the issue in a different manner, and why the issue is not adequate to deserve encouragement to proceed further.[3] The Fifth Circuit arguably withholds its reasoning for denying COA to immunize its orders from certiorari review.[4] Such cursory consideration of constitutional

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[2] In *Banks*, this Court held that the Fifth Circuit erred in denying a COA on whether Federal Rule of Civil Procedure 15(b) extends to habeas corpus proceedings. In *Tennard*, it held that the Fifth Circuit erred in denying a COA on whether the Texas capital sentencing scheme provides a constitutionally adequate means of presenting evidence of a defendant's low IQ in mitigation of punishment.

[3] The Fifth Circuit also issued a boilerplate form order denying COA in *Scott Lynn Taylor v. Nathaniel Quarterman*, Cause No. 06-1565 (filed May 23, 2007), which is pending before this Court. However, the order in petitioner's case was even more deficient than the one in *Taylor*, as it did not even state petitioner's constitutional claim or cite the *Slack v. McDaniel* standard of review applicable to COA motions.

[4] If this Court upholds this practice, it should be aware that Miller-El would have been executed had the Fifth Circuit issued such an order in his case.

claims cannot be adequate to meet the standard imposed by this Court.

This case is exceptional because of the criminal justice system's willingness to ignore overwhelming evidence that lawyers made a secret deal, failed to disclose it, and presented perjured testimony denying it. At a minimum, reasonable jurists could differ on the question of whether the state court decision that the prosecution did not suppress evidence and use perjured testimony was unreasonable, and the Fifth Circuit erred in concluding to the contrary.

Accordingly, this Court should exercise its supervisory powers and grant certiorari because the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and decided this case in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(a) and (c).

D. A Correct Application Of The COA Standard Would Have Resulted In The Issuance Of A COA.

Resolution of petitioner's COA motion requires discussion of the merits of his claim that the prosecution suppressed evidence and used perjured testimony.

1. Statement Of Facts

a. The Trial

Petitioner and his girlfriend, Ashley Cobb, quit their jobs at Bruegger's Bagels in Dallas in late November of 1996. Cobb testified that, while they were working there,

petitioner told her that the safe contained a lot of cash, which he would steal so they could move to Mexico.

Petitioner and Samuel May, the manager of the bagel shop, were friends. Petitioner had written three checks to May totaling $855 that were returned due to insufficient funds. Petitioner was on probation for misdemeanor theft at the time he wrote the checks. He called May's home on the night of January 9, 1997, and left messages that he wanted to meet May.

May and a friend, Dean Chisamore, were found shot to death in the cooler of the bagel shop on January 10, 1997, at 4:30 a.m. The safe was missing $2,343.[5] The police found Reginald Cardell's fingerprints inside the back door of the bagel shop.

Aleem Rasheed, Cardell's father, testified that he sold a nine millimeter pistol to Keith Brown in November of 1996. Brown testified that he sold the pistol to petitioner in Cardell's presence in early January of 1997.[6] This pistol probably was the murder weapon.

Reginald Cardell, who was charged with capital murder in the deaths of May and Chisamore, testified for the State.[7] The court conducted a hearing outside the presence of the jury at which Cardell testified in response to questions from his lawyer, Michael Gregory, that he was waiving his Fifth Amendment right not to testify even

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[5] The cash had been bound in bank wrappers or paper clips (4 R.R. 94).

[6] Brown was on felony probation (4 R.R. 234).

[7] The court instructed the jury that Cardell was an accomplice witness whose testimony required corroboration in order to convict petitioner.

though he had not been promised anything. Gregory then testified that he and prosecutor Tom D'Amore had not discussed reducing Cardell's capital murder charges and elaborated as follows:

> No, just the opposite. There has in fact specifically been conversations that have stated quite clearly that there was no deal; there was . . . not going to be any deal; every case had to stand on its own and on its own merit, and what happens after this, it just happens after this.

Cardell testified before the jury, in response to questions from D'Amore, that there had been no promises or discussions about "any type of bargain" for his testimony.

Cardell testified that petitioner wanted to buy a pistol. Cardell arranged for Brown to sell a pistol to petitioner on the morning of January 9, 1997. Cardell bought nine millimeter bullets and gave them to petitioner that afternoon. Cardell picked up petitioner that night so petitioner could sell the pistol to a friend at the bagel shop. Cardell parked in an alley behind the bagel shop. Petitioner told Cardell to wait in the car while he robbed a beauty shop in the shopping center. A few minutes later, petitioner and May came to the car to get Cardell. Cardell and Chisamore talked outside while petitioner and May entered the bagel shop. Petitioner then returned and told them to come inside to count the money.[8] Petitioner had everyone enter the cooler, pointed a pistol at May and Chisamore, and told them to get on their knees, turn around, and not look at him. Cardell ran outside and heard a gunshot. When petitioner got in the car, he said

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[8] Cardell thought that petitioner had sold the pistol to May.

that he killed them because May might have impregnated his girlfriend and had threatened to file charges over some bad checks. Cardell took petitioner home just after 10:00 p.m. The next day, petitioner made Cardell accept some of the stolen money against his will. On January 23, 1997, Cardell was arrested, and he implicated petitioner.

On the morning of January 24, petitioner left a restaurant when he saw the police outside. He tried to elude the police in Brown's car but was arrested. The police found a box of bullets in Brown's car that matched the type of bullets used in the murders and found an uncashed check written to May in petitioner's wallet. The police found money wrappers and a box of bullets that matched the type of bullets used in the murders during a search of the home of petitioner's parents.

Petitioner gave a written statement to the police acknowledging that he and Cardell drove by the bagel shop to meet May about 9:50 p.m., but did not stop because they did not see May's car. Cardell took petitioner home about 10:05 p.m. Petitioner's father confirmed the time that petitioner arrived at home.

The defense theory, as presented during summation, was that Cardell took petitioner home, returned to the bagel shop, killed May and Chisamore, and stole the money from the safe. The defense emphasized that Cardell bought the bullets, his car was parked outside the bagel shop, and his fingerprints were found inside the bagel shop.[9] The defense contended that Brown covered for Cardell by claiming that he sold the pistol to petitioner.

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[9] A police officer acknowledged that the physical evidence connected Cardell, not petitioner, to the murder scene.

Petitioner was convicted and sentenced to life imprisonment on January 20, 1998.

b. The State Habeas Investigation

The Texas Court of Criminal Appeals refused discretionary review on May 10, 2000. Petitioner hired present counsel to conduct a habeas investigation in July of 2000.

Habeas counsel noted that Gregory and Cardell had testified that there had not been any discussions regarding consideration for Cardell's testimony. Counsel researched the public records and discovered that, three months after petitioner's trial, the State dismissed one of the capital murder charges and reduced the other to robbery for a five-year non-aggravated sentence. Court records reflect that, on April 23, 1998, the State reduced Cardell's capital murder charge in the death of May to robbery; Cardell signed a judicial confession, pled no contest, and was sentenced to five years and a $300 fine on the State's recommendation. The State then dismissed the capital murder charge in the death of Chisamore.

Habeas counsel suspected that D'Amore and Gregory had an informal agreement or understanding that Cardell would receive consideration for his testimony. Counsel was simultaneously reviewing the Dallas County capital murder conviction of Abdel Rahim, also prosecuted by D'Amore. An inmate testified that Rahim made a confession to him in jail; he denied that there was an agreement for consideration on his pending cases. The inmate provided an affidavit in July of 2000 that D'Amore had agreed to "take care of" his pending cases after he testified, although D'Amore would not commit to a specific benefit. More importantly, his lawyer provided an affidavit in

August of 2000 that this arrangement was made before Rahim's trial. Counsel suspected that D'Amore and Gregory made a similar arrangement in petitioner's case.

Habeas counsel called Gregory on November 20, 2000, and recorded the conversation. Counsel told Gregory that he was working on a case in which D'Amore was the prosecutor and he understood that Gregory had dealt with D'Amore in a capital murder case in which his client testified for the State.[10] Counsel asked Gregory whether D'Amore could be trusted if he told a lawyer before trial that he would "take care of" a witness after the witness testified, but would not reduce the agreement to writing. Gregory said that D'Amore had promised before trial to "take care of" his client after the client testified and had led Gregory to believe that both capital murder charges would be dismissed. Gregory trusted D'Amore, despite the absence of a written agreement, as D'Amore had kept his word in another case. Gregory's client testified at the capital murder trial of the co-defendant, who was convicted. Thereafter, D'Amore told Gregory that his supervisors had ordered him to obtain a conviction on the client. D'Amore said that he would dismiss one capital murder charge and reduce the other to robbery for a five-year non-aggravated sentence; if the client did not accept the plea bargain, he would be tried for capital murder. The client accepted the plea bargain. Gregory felt that D'Amore had reneged on their agreement. Gregory asked counsel to keep their conversation confidential because he had to work with Dallas County prosecutors. Counsel thanked

[10] Habeas counsel's statement was true, as he was working on the cases of petitioner and Rahim.

Gregory for the information but did not agree to keep the conversation confidential.

Habeas counsel sent Gregory a proposed affidavit on November 22, 2000, that summarized their conversation. When Gregory did not respond, counsel called him on December 7, 2000, and again recorded the conversation. Gregory said that he would not sign the affidavit because he had disclosed this information in confidence and did not want to be involved in someone else's case. He emphasized that Dallas County prosecutors were very adversarial and he did not want them to "go after" him.

c. The State Habeas Proceeding

Petitioner filed a state habeas corpus application on May 21, 2001, alleging that the State suppressed evidence and used Cardell's perjured testimony regarding the agreement or understanding for consideration. D'Amore and his investigator, David Barker, filed affidavits in June of 2001 denying that D'Amore offered Cardell consideration for his testimony. The court ordered Gregory to file an affidavit addressing the issue. Gregory filed an affidavit in November of 2001 denying that there was an offer of consideration. Petitioner filed a motion to require Gregory to file another affidavit addressing whether he made nine specific statements to habeas counsel regarding the matter.[11] The court granted the motion. Gregory filed another affidavit in April of 2002 denying that he made any of these statements to counsel.

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[11] These statements were taken from the recorded conversations.

The court conducted an evidentiary hearing at petitioner's request. Gregory testified that, when D'Amore contacted him about Cardell testifying for the State, Gregory asked what would happen to Cardell. D'Amore responded that there would not be a deal and that Cardell would have to "take it on faith"; D'Amore did not ask Gregory to trust him to take care of Cardell after Cardell testified. Although Gregory and D'Amore discussed consideration for Cardell's testimony before Cardell testified, and Gregory was present when Cardell testified that there had been no such discussion, Gregory did not notify trial counsel of this inaccuracy. Gregory denied telling habeas counsel that he and D'Amore had a "handshake deal"; that D'Amore asked Gregory to trust him to take care of Cardell after Cardell testified; and that Gregory understood D'Amore to mean that the capital murder charges would be dismissed.[12]

Habeas counsel played the tape recordings of the telephone conversations, and the court admitted transcripts. Although Gregory was compelled to acknowledge that he made the statements to habeas counsel that he had just denied making, he asserted that some of the statements were false.[13] Gregory attempted to justify his perjured testimony on the basis that Dallas County prosecutors were very adversarial, and he feared that they would target him for prosecution if he testified that there

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[12] Gregory acknowledged that the physical evidence implicated only Cardell, who easily could have been convicted of capital murder.

[13] Gregory testified that he did not feel obliged to tell habeas counsel the truth during their telephone conversations because he was not under oath. Apparently, he also did not feel obliged to tell the truth at the hearing, when he was under oath.

was a deal. He elaborated that, after he testified contrary to a police officer's testimony in an unrelated case, a Dallas County prosecutor sent him a letter advising that he was under investigation for perjury; as a result, he was intimidated by Dallas County prosecutors and did not want to be threatened with prosecution again. He was "backing off" what he told habeas counsel on the telephone now that he realized that the issue was whether the State suppressed evidence and used perjured testimony at appellant's trial; otherwise, he feared that the Dallas County District Attorney's Office would retaliate by investigating him and not offering plea bargains to his clients.[14]

The state habeas court found that there was no agreement or understanding that Cardell would receive consideration for his testimony. The court further found that Gregory was not credible; that he lied to habeas counsel that D'Amore had agreed to take care of Cardell after Cardell testified against petitioner; and that he testified truthfully at the evidentiary hearing that there was no agreement, which D'Amore and the investigator confirmed by affidavits.[15] The Texas Court of Criminal Appeals denied relief without written order based on these findings.

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[14] Gregory acknowledged that he does not trust the Dallas County District Attorney's Office.

[15] Neither D'Amore nor the investigator testified at the evidentiary hearing.

d. The Federal Habeas Proceeding

Petitioner filed a federal habeas corpus petition alleging that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. The Magistrate Judge recommended that relief be denied. Petitioner filed objections. The District Court overruled the objections and, with one exception, adopted the Magistrate Judge's findings, conclusions, and recommendation, and denied relief.[16]

2. The Standard Of Review

Suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83 (1963); U.S. CONST. amends. V and XIV. The prosecution has a duty to volunteer favorable evidence, even if it was not requested or was requested only in a general way, if the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Regardless of any defense request, favorable evidence is material, and constitutional error results from its suppression by the prosecution, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

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[16] The Magistrate Judge found that an attorney "violates ethical standards when a telephone conversation is recorded without the other person's knowledge." The District Court observed that "the Texas State Bar determined in 1997 that it is not unethical for an attorney to record a conversation without the knowledge of the other person."

different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The knowing use of false testimony by the prosecution violates due process. *Giglio v. United States*, 405 U.S. 150 (1972). The defendant must show that the testimony was false, the prosecution knew it, and the testimony was material. A showing of materiality does not require the defendant to prove that disclosure of the suppressed evidence or impeachment of the perjured testimony would have resulted in an acquittal. The question is not whether he more likely than not would have received a different verdict, but whether he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

A federal habeas court must defer to a state court decision unless it was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1) and (2). A state court's determination of the facts is presumed to be correct unless the petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). However, deference to a state court's fact findings does not preclude federal habeas corpus relief. "A federal court can disagree with a state court's credibility determination and, when guided by the AEDPA, conclude that the decision was unreasonable." *Miller-El v. Cockrell*, 537 U.S. at 340.

3. The Suppressed Evidence And The Perjured Testimony

Neither the state nor the federal habeas courts have provided a logical answer to the critical question of why Gregory would lie to habeas counsel when asked whether D'Amore could be trusted when he said that he would "take care of" a witness after the witness testified but would not reduce the agreement to writing. Gregory had no motive to lie to habeas counsel during their telephone conversations that he hoped would remain confidential, especially where he did not know of counsel's interest in petitioner's case. However, Gregory had a substantial motive to lie at the state evidentiary hearing based on his admitted (and realistic) fear that Dallas County prosecutors would retaliate against him and his clients if he admitted that there was an agreement. Simply stated, there is overwhelming evidence that Gregory told the truth in the recorded telephone conversations that he hoped would remain confidential and that he lied under oath at the evidentiary hearing to avoid antagonizing Dallas County prosecutors.

The state court finding that there was no agreement or understanding that Cardell would receive leniency in exchange for his testimony was unreasonable in light of the evidence presented. Gregory told habeas counsel in detail when and how the agreement was made, when and how it was consummated, and why he felt that D'Amore had reneged, at least in part.[17] The proof is in the pudding. Three months after Cardell testified, he pled no contest to

[17] That Gregory thought he was speaking to habeas counsel in confidence makes his recitation of the events all the more reliable.

robbery, was sentenced to five years and a $300 fine, and the State dismissed both capital murder charges. If this state court determination of the facts is reasonable in light of the evidence, no state court factual determination could be unreasonable.

A state court decision may be overturned if its determinations of fact are "objectively unreasonable in the light of the evidence presented in the state court proceeding." *Miller-El v. Cockrell*, 537 U.S. at 340. Deference to state court findings does not imply abandonment or abdication of judicial review. *Id.* A federal court can disagree with a state court's credibility determination and, when guided by the AEDPA, conclude that the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence. *Id.*; *see Norton v. Spencer*, 351 F.3d 1 (1st Cir. 2003) (state court findings disbelieving affidavits recanting sexual assault allegations were unreasonable); *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004) (state court findings that defendant's confession was voluntary were unreasonable); *Guidry v. Dretke*, 397 F.3d 306 (5th Cir. 2005) (district court properly rejected state court findings that defendant did not request counsel before interrogation and that detectives did not lie to him that counsel authorized him to speak with them).

Gregory's candid admissions to habeas counsel, made when he had no motive to lie, were consistent with the events that unfolded after petitioner's trial. Gregory candidly described his dealings with D'Amore in the recorded telephone conversations. Gregory asserted that D'Amore said before petitioner's trial that he would "take care of" Cardell; Gregory understood D'Amore to mean that he would dismiss both capital murder charges. Their informal "handshake deal" was not reduced to writing so it

would not have to be disclosed to the defense. Thereafter, D'Amore told Gregory that his supervisors had ordered him to obtain a conviction on Cardell. D'Amore said that he would dismiss one capital murder charge and reduce the other to robbery for a five-year non-aggravated sentence; if Cardell did not accept the plea bargain, he would be tried for capital murder. Cardell accepted the plea bargain. Gregory complained to habeas counsel that D'Amore had reneged on their agreement, and concluded, "So if you're asking me if Tom D'Amore can be trusted, the answer is no."

Thereafter, Gregory refused habeas counsel's request to sign an affidavit regarding these events. He explained that he provided the information in confidence, did not want to be "dragged into court" on "somebody else's deal," and that Dallas County prosecutors were "very adversarial" and can "go after you." He testified at the evidentiary hearing that he was intimidated by Dallas County prosecutors and feared retaliation if he testified to what he previously told counsel. Thus, petitioner proved by clear and convincing evidence that the State suppressed favorable impeachment evidence and used perjured testimony. The state court's findings to the contrary were unreasonable. The federal district court erred in deferring to them.

4. Materiality

There was circumstantial evidence that petitioner had a motive and the opportunity to commit the murders. However, Cardell provided the only testimony that directly implicated him. Cardell's testimony was essential to the conviction, and his credibility was the critical issue at trial.

There was more compelling circumstantial evidence that Cardell committed the murders than petitioner. Cardell's father and a friend previously owned the likely murder weapon. Cardell's car was parked outside the bagel shop at the time of the murders. Cardell admitted that he was at the bagel shop during the murders, and his fingerprints were found inside the bagel shop. A jury that did not believe Cardell's testimony probably would have acquitted petitioner, as the physical evidence connected Cardell, rather than petitioner, to the murders. The State falsely portrayed Cardell as a contrite young man who came forward to testify without requesting consideration. In fact, Cardell seized the opportunity to trade his testimony for leniency, and his lawyer and the prosecutor conspired to conceal their discussions. Had the State disclosed the nature of the agreement and not elicited Cardell's false testimony denying any discussions regarding leniency, there is a reasonable probability that the jury would not have believed him. Indeed, that is exactly why the State suppressed the agreement and elicited the false testimony. Thus, reasonable jurists could find that the district court's assessment of petitioner's constitutional claims is debatable or wrong or that the issues presented are adequate to deserve encouragement to proceed further.

Neither the District Court nor the Fifth Circuit gave full consideration to the substantial evidence petitioner developed at the evidentiary hearing that supports his claim and the caselaw from this Court that undermines the conclusion that the State did not suppress evidence and use perjured testimony. Petitioner's habeas claim is debatable among jurists of reason, a court could resolve the issue in a different manner, and the issue is adequate

to deserve encouragement to proceed further. Accordingly, a COA should have issued.

CONCLUSION

Petitioner requests that this Court conclude that a COA should have issued, summarily reverse the judgment of the Fifth Circuit, and remand for consideration of the merits of the appeal.

Respectfully submitted,

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Counsel for Petitioner
Stephen Raymond Dominick

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-10635

STEPHEN DOMINICK

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed Jul. 20, 2007)

Before JAMES L. DENNIS

PER CURIAM:

IT IS ORDERED that the appellant's motion for certificate of appealability is Denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHEN RAYMOND DOMINICK,	§	
Petitioner,	§	
	§	
vs.	§	
	§	**USDC 3:05CV1271-G**
DOUGLAS DRETKE, Director,	§	**USCA 06-10635**
Texas Department of Criminal	§	
Justice, Correctional Institutions	§	
Division,	§	
Respondent.	§	

CERTIFICATE AS TO APPEALABILITY

(Filed Aug. 4, 2006)

A Notice of Appeal has been filed in the above captioned action in which:

(X) the District Court has entered a final order in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254.

( ) the District Court has entered a final order in a proceeding pursuant to 28 U.S.C. § 2255.

Pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), the undersigned Magistrate Judge finds and recommends as follows:

IFP STATUS:

( ) the party appealing should be GRANTED leave to proceed *in forma pauperis.*

( ) the party appealing is proceeding *in forma pauperis.*

( ) the party appealing should be DENIED leave to proceed *in forma pauperis* for the following reason(s):

( ) the Court recommends that the District Court certify, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915(a)(3), that the appeal is not taken in good faith;

( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and/or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order filed on).

(X) the person appealing is not a pauper; he paid the $455.00 filing fee.

COA:

( ) a Certificate of Appealability should be GRANTED. (See issues set forth below).

(X) a Certificate of Appealability should be DENIED. (See reasons stated below).

REASONS FOR DENIAL: For the reasons stated in the Findings, Conclusions and Recommendation of the United States Magistrate Judge, filed on April 24, 2006, which were adopted by the District Court on May 11, 2006, Petitioner has failed to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel,* 529 U.S. 473, 484-85 (2000).

DATE: August 3, 2006

/s/ Wm. F. Sanderson Jr.
UNITED STATES MAGISTRATE JUDGE

ORDER OF THE COURT ON THE FOREGOING RECOMMENDATION

Considering the record in this case and the above recommendation, and pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), the Court hereby finds and orders:

IFP STATUS:

( ) the party appealing is GRANTED *in forma pauperis* status on appeal.

( ) the party appealing is proceeding in *forma pauperis.*

( ) the party appealing is DENIED in *forma pauperis* status on appeal for the following reasons:

( ) the Court certifies, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915 (a)(3), that the appeal is not taken in good faith. In support of this finding, the Court adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation filed in this case on _____. Based upon the Magistrate Judge's findings, this Court finds that the appeal presents no legal points of arguable merit and is therefore frivolous. *See Harkins v. Roberts,* 935 F. Supp. 871, 873 (S. D. Miss. 1996) (citing *Howard v. King,* 707 F. 2d 215, 219-20 (5th Cir. 1983)).

( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and/or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order filed on _____).

(X) the person appealing is not a pauper; he paid the $455.00 filing fee.

COA:

( ) a Certificate of Appealability is GRANTED on the following issues: _____

_____

(X) a Certificate of Appealability is DENIED. The Court hereby adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation filed in this case on April 24, 2006, in support of its finding that Petitioner has failed to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel,* 529 U.S. 473, 484-85 (2000).

DATE: August 4, 2006

/s/ A. Joe Fish
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHEN RAYMOND DOMINICK, Petitioner, VS. DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 3:05-CV-1271-G **ECF**

JUDGMENT

(Filed May 11, 2006)

This action came on for consideration by the court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED, ADJUDGED** and **DECREED** that the petition be, and it is hereby **DENIED** on the merits.

It is further **ORDERED** that the clerk shall transmit a true copy of this judgment and the order accepting the findings, conclusions, and recommendation of the United States Magistrate Judge to petitioner and counsel for respondent.

May 11, 2006.

/s/ A. Joe Fish
A. JOE FISH
CHIEF JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHEN RAYMOND DOMINICK, Petitioner, VS. DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 3:05-CV-1271-G **ECF**

ORDER

(Filed May 11, 2006)

United States Magistrate Judge William F. Sanderson, Jr. made findings, conclusions, and a recommendation in this case. Petitioner filed objections and the district court has made a *de novo* review of those portions of the proposed findings and recommendation to which objection was made. The objections are **OVERRULED** and the court **ACCEPTS** the findings, conclusions, and recommendation of the United States Magistrate judge with the following clarification.

Habeas counsel for the petitioner objects with particular vehemence regarding the magistrate judge's statement "that an attorney 'violates ethical standards when a telephone conversation is recorded without the other person's knowledge.'" Petitioner's Objections to the Findings, Conclusions, and Recommendation of the United States Magistrate judge ("Objections") at 1-2 (citing Findings, Conclusions, and Recommendation of the United States Magistrate Judge at 7, n.2). Noting that the "Magistrate

Judge's research . . . was incomplete," habeas counsel then points the court to a letter written by Steven W. Young, General Counsel to the Texas State Bar, clarifying Professional Ethics Opinion 514, on which the Magistrate judge's statement was based. This letter, later reprinted in the April 1997 edition of *Voice For the Defense,* the Texas Criminal Defense Lawyer's Association Monthly Magazine, states the following:

> Professional Ethics Opinion 514 sets forth the Professional Ethics Committeeís [sic] opinion that. such taping is unethical. Those opinions are not binding on the grievance system.
>
> . . . Currently this position is that such conduct, if otherwise legal, is not unethical. Based on that position, we currently classified any allegation such as described in the opinion as any [sic] inquiry and as such it is dismissed at the initial review stage by the Chief Disciplinary Counsel Staff.

February 4, 1997 letter from Steven W. Young *attached to* Objections *as* Exhibit A.

Not wishing to impugn habeas counsel's character or ethics inadvertently, the court notes that the Texas State Bar determined in 1997 that it is not unethical for an attorney to record a conversation without the knowledge of the other person.

SO ORDERED.

May 11, 2000.

/s/ A. Joe Fish
A. JOE FISH
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHEN RAYMOND DOMINICK, No. 821763, Petitioner,	§	
v.	§	NO. 3:05-CV-1271-G
DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Apr. 24, 2006)

Pursuant to the provisions of 28 U.S.C. § 636(b) and an order of the District Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions, and recommendations of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type of Case: This is a petition for habeas corpus relief filed by a state inmate pursuant to 28 U.S.C. § 2254.

Parties: Petitioner Stephen Raymond Dominick ("Dominick" or "Petitioner") is confined at the Connally Unit of the Texas Department of Criminal Justice, Correctional Institutions Division ("TDCJ-CID") at Kenedy, Texas. Respondent is the Director of the TDCJ-CID.

Statement of the Case: Dominick pled not guilty in cause number F-97-03534-IS to the offense of capital murder. The State did not seek the death penalty, and after the jury found him guilty of capital murder, he received an automatic life sentence.

Petitioner appealed his sentence to the Fifth District Court of Appeals and on November 17, 1999, the court affirmed the trial court's judgment. *Dominick v. State,* No. 05-98-00148-CR (Tex. App. – Dallas Nov. 17, 1999). Dominick's petition for discretionary review ("PDR") was refused by the Texas Court of Criminal Appeals on May 26, 2000.

On May 21, 2001, pursuant to Texas Code of Criminal Procedure article 11.07, Dominick filed a habeas application challenging his conviction. *Ex parte Dominick,* Appl. No. 61,399-01 at 2. After an evidentiary hearing, the trial court found Dominick's claims to be without merit, and recommended that habeas relief be denied. *Ex parte Dominick,* Appl. No. 61,399-01 at 103. On April 27, 2005, the Texas Court of Criminal Appeals denied Dominick's application without written order on the findings of the trial court after a hearing. *Ex parte Dominick,* Appl. No. 61,399-01 at cover.

Petitioner filed the instant petition on June 22, 2005. On September 23, 2005, Respondent filed his answer contending that all of Dominick's claims are without merit. Dominick filed his traverse on September 28, 2005.

Findings and Conclusions: Review of Dominick's claims is governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") because he filed his § 2254 petition after the effective date of the AEDPA. The AEDPA, in pertinent part, provides that a

federal court cannot grant relief under § 2254 of the act unless the adjudication of a state prisoner's claim in the state court system, "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C § 2254(d)(1)-(2) (1996). Findings of fact made by a state court are presumed to be correct absent clear and convincing evidence rebutting the presumption. § 2254(e)(1). Where a petitioner challenges a state court's application of federal law under § 2254(d)(1), the petitioner must also show that the state court's decision was not only erroneous, but objectively unreasonable. *See Yarborough v. Gentry,* 540 U.S. 1, 5, 124 S. Ct. 1, 4 (2003) (citing *Williams v. Taylor,* 529 U.S. 362, 409, 120 S. Ct. 1495, 1521 (2000)); *see also Morrow v. Dretke,* 367 F.3d 309, 313 (5th Cir. 2004), *cert. denied,* 125 S. Ct. 421 (2004) ("[F]ederal habeas relief is only merited where the state court decision is both incorrect and objectively unreasonable.").

Dominick, in his sole ground of error, argues that he was denied due process of the law because: (1) the State suppressed evidence that its "key" witness, co-defendant Reginald Cardell ("Cardell"), had been promised leniency in exchange for his testimony, and (2) the State presented perjured testimony because Cardell denied that he had been offered leniency in exchange for his testimony. Respondent asserts that Petitioner has wholly failed to demonstrate that the state court's findings of fact, which were signed after the trial court held an evidentiary hearing, are unreasonable.

Reginald Cardell's Testimony

The evidence presented at trial is thoroughly and accurately summarized in the direct appeal briefs of Petitioner and the State. Although the prosecution's case was not based solely on the testimony of Reginald Cardell, suffice it to say that he was the most important witness for the prosecution, having been present with Petitioner at the scene of the dual murders, corroborating the testimony of others as to the motives for the murders and testifying to the absence of remorse exhibited by Dominick after the murders were committed.

Denial of Due Process

Under *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 1197 (1963), a prosecutor is guilty of misconduct when he or she fails to turn over evidence to the defense that is favorable to the accused. A defendant, who has the burden of proving that a *Brady* violation occurred at trial, must establish that: (1) the prosecution suppressed evidence, (2) the suppressed evidence was favorable to the defense and (3) prejudice ensued. *United States v. Sipe,* 388 F.3d 471, 477 (5th Cir. 2004). Prejudice occurs where "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 478.

Dominick alleges that the State, specifically prosecutor Tom D'Amore ("D'Amore), entered into a secret plea agreement with Cardell whereby Cardell would receive consideration for his testimony. Petitioner further alleges that D'Amore permitted Cardell to perjure himself in open court by denying the existence of a secret agreement.

Evidence of an "understanding or agreement as to future prosecution" is relevant to the credibility of a witness who testifies on behalf of the State at trial. *See Giglio v. United States,* 405 U.S. 150, 154-155, 92 S. Ct. 763, 766 (1972). Where the witness' testimony "may well be determinative of guilt or innocence," nondisclosure of such an agreement or understanding violates *Brady* and constitutes a denial of due process. *Id.* at 154, 92 S. Ct. at 766 (quoting *Napue v. Illinois,* 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959)); *see also East v. Johnson,* 123 F.3d 235, 239 (5th Cir. 1997) ("[W]hen the withheld evidence would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material.") (citation omitted).

However, evidence that the State sought a "lighter" sentence against a codefendant after the codefendent testified does not conclusively establish the pre-trial existence of an agreement or understanding as to the future prosecution of the cooperating defendant. *See Williams v. Coyle,* 260 F.3d 684, 707 (6th Cir. 2001). Likewise, "the simple belief by a defense attorney that his client may be in a better position to negotiate a reduced penalty should he testify against a codefendant is not an agreement within the purview of *Giglio.*" *Alderman v. Zant,* 22 F.3d 1541, 1555 (11th Cir. 1994); *see also Voyles v. Watkins,* 489 F. Supp. 901, 906 (D.C. Miss. 1980) (noting that an "expectation that leniency might be shown" differs from an express or implied agreement as to the future prosecution of a testifying witness).

If a prosecutor has entered into an agreement with a cooperating witness, it would further violate the holding in *Giglio* to either present or fail to correct false testimony

regarding the existence of such an agreement. *See Giglio,* 405 U.S. at 153-54, 92 S. Ct. at 766. Where a petitioner argues that false testimony was presented, the petitioner bears the burden of proving that: (1) the witness testified falsely, (2) the prosecution offered the testimony knowing it was false, or failed to correct the false testimony, and (3) the testimony was material. *United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002). The materiality of the testimony is judged by whether "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio,* 405 U.S. at 153-54, 92 S. Ct. at 766 (quoting *Napue,* 360 U.S. at 271, 79 S. Ct. at 1178). Obviously, proof of a pre-existing "understanding or agreement as to future prosecution" between the testifying witness and the prosecution is a *sine qua non* for the remaining due process claims since, absent an agreement, no *Brady* violation is present, nor would there be a basis for the knowing use of perjured testimony.

In its findings following the evidentiary hearing, the state district court found *inter alia* that: (1) "The Court finds that there was no deal or agreement made by the State in exchange for Mr. Cardell's testimony against the Appellant;" (2) "The Court finds that no written or oral agreement was made by D'Amore [the prosecutor] in exchange for Mr. Cardell's testimony" and (3) "The Court finds that there was no unspoken understanding that Mr. Cardell would receive leniency or have his cases (*sic*) dismissed if he testified against the applicant." *Ex parte Dominick,* Appl. No. 61,399-01 at 102-103. In its conclusions of law, the district court further found that: (1) "The Court concludes that the Applicant has failed to meet his burden on his allegations;" (2) "The Court finds that since there was no agreement, there was nothing for the State

to disclose to defense counsel" and (3) "The Court concludes that the accomplice witness, Reginald Cardell, did not commit perjury when he testified that there was no agreement" *Ex parte Dominick*, Appl. No. 61,399-01 at 103. As noted above, the Texas Court of Criminal Appeals denied the application on the trial court's findings. *Ex parte Dominick,* Appl. No. 61,399-01 at cover.

Dominick argues that the finding that there was no agreement or understanding that Cardell would receive leniency or other consideration for his testimony constitutes an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(1). As noted above, findings of fact made by a state court are presumed to be correct absent "clear and convincing" evidence rebutting the presumption. *See* § 2254(e)(1).

The evidence before the court in Dominick's article 11.07 application consisted of the affidavits of prosecutor Tom D'Amore, *Ex parte Dominick*, Appl. No. 61,399-01 at 55-56, the State's investigator David Barger, *Ex parte Dominick,* Appl. No. 61399-01 at 57-58, and Michael Gregory, Cardell's lawyer, *Ex parte Dominick,* Appl. No. 61,399-01 at 60-61 (executed on Nov. 9, 2001), 75-77 (executed on Apr. 15, 2002), and the testimony of Michael Gregory and Phillip Weatherbee given at the evidentiary hearing on August 15, 2002, *Ex parte Dominick,* Appl. No. 61,399-01 at 109-168.[1]

[1] The state court also had available the testimony of Cardell with reference to the issue of promises, (Rep.'s R. v. 5 at 61-63), and the statements of his attorney, Mr. Gregory in the *sub rosa* hearing, (Rep.'s R. v. 5 at 64-66), and Cardell's testimony before the jury, (Rep.'s R. v. 5 at 68-69).

With the exception of certain comments made by Michael Gregory in telephone conversations between him and Petitioner's habeas counsel, Randy Schaffer, which were surreptitiously recorded by Schaffer, *Ex parte Dominick,* Appl. No. 61,399-01 at 176-84 (Exhs. G and H), there is no evidence that Cardell's trial testimony was given in exchange for a promise of leniency.

After Gregory testified at the evidentiary hearing that there was no deal given to Cardell by the prosecutor, Schaffer sought to impeach his testimony with the statements made in the recorded conversation.[2] *Ex parte Dominick*, Appl. No. 61,399-01 at 144 *et seq.* However, Gregory remained firm in his testimony that Cardell knew that there was no deal on the table and that he never conveyed any offer to Cardell.[3] *Ex parte Dominick,* Appl. No. 61,399-01 at 152.

In addressing the claim in the article 11.07 application, the court made credibility determinations. Specifically, the

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[2] A review of the transcript discloses a studied lack of candor in fairly advising Gregory of the purposes of the initial telephone conversation. The state court found that "Mr. Schaffer having misrepresented himself to Mr. Gregory, it is not inconceivable that Mr. Gregory would have made misrepresentations to Mr. Schaffer." *Ex parte Dominick,* Appl. No. 61,399-01 at 102. In point of fact, Gregory testified that he had made certain false statements in the conversation. *Ex parte Dominick*, Appl. No. 61,399-01 at 149-53. An attorney violates ethical standards when a telephone conversation is recorded without the other person's knowledge. *See* Supreme Court of Texas Professional Ethics Committee, Op. 514, 1996 WL 766596 (1996).

[3] It is axiomatic that the rational for the Supreme Court's decision in *Giglio, supra,* is predicated on a finding that a promise of favorable consideration was made known to the beneficiary of the promise prior to giving his testimony against another. In the present case, the only evidence before the state court as to Cardell's understanding was that there was no deal. (Rep.'s R. v. 5 at 61-63, 68-69.)

court found that the statements of the prosecutor and the investigator were credible. *Ex parte Dominick,* Appl. No. 61,399-01 at 102. The court further found the testimony of Phillip Weatherbee to be credible. *Ex parte Dominick,* Appl. No. 61,399-01 at 102. The court found Gregory not to be a credible witness, but did find that his testimony that there was no deal in exchange for Cardell's testimony to be truthful because it was supported by the affidavits of D'Amore and Barger. *Ex parte Dominick*, Appl. No. 61,399-01 at 101-02.[4]

Federal Habeas Proceedings

It is clear from the record that Gregory made untruthful statements. Gregory's testimony at both the trial and the evidentiary hearing as well as his sworn statements in his affidavits conflict sharply with the statements he made to Schaffer during their first recorded telephone conversation. The trial court was therefore faced with the difficult decision to accept all, part of or none of the testimony of Gregory. *See, e.g., Pena v. Garza,* 61 S.W.3d 529, 532 (Tex. App. – San Antonio 2001, no pet.). The trial court rejected Gregory's unsworn statement that he entered into a "handshake deal" with D'Amore and accepted as truthful Gregory's numerous sworn statements that no agreement existed.

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[4] Under Texas state law, factual issues raised in an article 11.07 application may be resolved by affidavits or by an evidentiary hearing, or a combination of the two. These procedures comport with the requirements set out in 28 U.S.C. § 2254(d) as they existed prior to the enactment of the AEDPA. *See, e.g., Smith v. Estelle,* 711 F.2d 677, 681 (5th Cir. 1983), *cert. denied* 466 U.S. 906 (1984); *Lincecum v. Collins,* 958 F.2d 1271, 1279 (5th Cir. 1992), *cert. denied* 596 U.S. 957 (1992) (collecting cases).

Because the state trial court made credibility determinations after the evidentiary hearing and reached the merits of Petitioner's *Brady/Giglio* claims, those findings are afforded "substantial deference" under the AEDPA. *See* § 2254(d)(2), (e)(1); *see also Guidry v. Dretke,* 397 F.3d 306, 326 (5th Cir.2005) (noting that a district court "may not substitute its own credibility determinations for those of the state court simply because it disagrees with the state court's findings"). Under § 2254(e)(1), the state court's factual findings are "presumed to be correct" and may only be rebutted by "clear and convincing evidence." Where the state court reaches the merits of a petitioner's claims, as it did in this case, relief is warranted only if the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). The trial court's decision to accept part of Gregory's testimony was correct, especially in light of the sworn affidavits from D'Amore, and his investigator, Berger [sic], stating that there was no secret agreement. Therefore, the court's determination that no agreement existed was not unreasonable. Because the Magistrate Judge finds that the trial court's factual determination regarding the non-existence of a secret plea agreement was not unreasonable, the trial court's legal determination that Petitioner was not denied due process of the law was not unreasonable.

RECOMMENDATION:

For the foregoing reasons, it is recommended that the district court deny the petition on the merits.

Signed this 24th day of April, 2006.

/s/ Wm. F. Sanderson Jr.
Wm. F. Sanderson Jr.
United States Magistrate Judge

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten (10) day period may bar a *de novo* determination by the district judge of any finding of fact and conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[POSTMARK April 27, 2005]

RE: Writ No. WR-61, 399-01
STYLE: DOMINICK, STEPHEN RAYMOND
TRIAL CT NO: W97-03534-S(A)
4/27/2005

This is to advise that the court has denied without written order on the findings of the trial court after hearing the application for writ of habeas corpus.

Troy C. Bennett, Jr.

Randy Schaffer
1301 McKinney
Suite 3100
Houston, TX 77010

Cause Number W97-035334-S(A)

Ex parte	§	**IN THE 282ND JUDICIAL**
STEPHEN RAYMOND DOMINICK,	§	**DISTRICT COURT**
Applicant	§	**DALLAS COUNTY, TEXAS**

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has filed an Application for Writ of Habeas Corpus alleging that the prosecution and the attorney for the accomplice witness had an agreement that was not disclosed to defense counsel that the accomplice witness would receive consideration on his case in exchange for his testimony against the Applicant. Applicant also alleges that the accomplice witness committed perjury when the accomplice denied at trial that there was such an agreement. Applicant contends this denied Applicant due process of law and a fair trial. The Court, based upon a review of the Court's file in this case, the pleadings submitted, the affidavits submitted, the testimony elicited at the hearing on this matter, and the argument of counsel, now makes the following findings of fact and conclusions of law:

HISTORY OF THE CASE

A jury convicted Applicant of the offense of capital murder. The State did not seek the death penalty and punishment was set automatically at confinement in the Institutional Division for life. Applicant's conviction was affirmed by the Court of Appeals for the Fifth District of Texas at Dallas on November 17, 1999, in an unpublished

opinion, cause number 05-98-00148-CR. Petition for discretionary review was refused. This is Applicant's first application for a writ of habeas corpus.

After reviewing Applicant's writ application and the State's response thereto, the trial court ordered Michael Gregory, attorney for the accomplice witness Reginald Cardell, to provide the Court with an affidavit addressing Applicant's allegations. The Court found the first affidavit provided by Michael Gregory insufficient and ordered Mr. Gregory to provide an additional affidavit addressing specific issues raised by Applicant's writ application.

After receiving counsel's second affidavit, the trial court determined that an evidentiary hearing was necessary to resolve the issues. The trial court then conducted a hearing and received testimony from Michael Gregory.

FINDINGS OF FACT

GROUND ONE – DENIAL OF DUE PROCESS AND A FAIR TRIAL

In his first and only ground, Applicant alleges that he was denied due process and a fair trial due to the State's failure to disclose an agreement with the accomplice witness, Reginald Cardell, to obtain Mr. Cardell's testimony against Applicant, and the use of allegedly perjured testimony by Mr. Cardell in denying there was such an agreement.

Attached to Applicant's writ application is an affidavit from Applicant's writ counsel, Randy Schaffer. In his affidavit, Mr. Schaffer states that in a telephone conversation with Mr. Gregory, Mr. Gregory stated that Tom D'Amore, the prosecutor on Applicant's capital murder

case, promised to "take care of" Mr. Cardell if Mr. Cardell testified against Applicant. Mr. Schaffer further states in his affidavit that Mr. Gregory stated that Tom D'Amore had led him to believe Cardell's capital murder charges would be dismissed if Cardell testified against Applicant.

Mr. Schaffer also states in his affidavit that Mr. Gregory refused to sign an affidavit confirming his statements.

The State's Response to Applicant's Application contains affidavits from Tom D'Amore, the prosecutor assigned to both Mr. Cardell's case and to Applicant's case, and from David Barger, an investigator for the Dallas County District Attorneys Office.

Mr. D'Amore in his affidavit denies making any promises in exchange for Mr. Cardell's testimony. He states that he specifically told Mr. Cardell that he could still be tried for his offenses, even with his testimony. Mr. D'Amore further states that investigator David Barger was present at all meetings with Mr. Cardell.

Mr. Barger states in his affidavit that he, along with Tom D'Amore, met with Reginald Cardell and Mr. Gregory several times regarding the Stephen Dominick case. He further states that nothing was promised to Mr. Cardell in exchange for information or testimony and that it was made clear to Mr. Cardell that they could not help him.

The Court finds that the affidavits submitted by Mr. Schaffer and Mr. Gregory are conflicting.

At the evidentiary hearing Mr. Gregory denied that Mr. D'Amore had agreed to "take care of" Mr. Cardell after Cardell testified, and denied there were any deals. (RR 8, 10, 11, 13, 14, 17, 19, 43, 50, 53).

Mr. Gregory further stated at the hearing that the deal on Mr. Cardell's cases was made after Mr. Cardell had testified. (RR 8).

Throughout his testimony at the hearing Mr. Gregory denied making statements to Mr. Schaffer that a deal for Mr. Cardell's testimony had been made, or testified that he couldn't remember making such statements, or stated that if he did make statements to that effect it was wrong to have said it. (RR 12, 13, 14, 24, 32, 33, 36).

At the hearing, Mr. Gregory was then given an opportunity to listen to tape recordings of conversations between Mr. Gregory and Mr. Schaffer which Mr. Schaffer secretly recorded during which Mr. Schaffer misrepresented himself to Mr. Gregory in order to elicit information from Mr. Gregory. (RR 38, 40, 41).

After listening to the taped conversations, Mr. Gregory testified that much of what he told Mr. Schaffer on the tape was false. (RR 45, 48).

The Court finds Michael Gregory not to be a credible witness.

The Court finds that Mr. Gregory did make statements over the telephone to Mr. Schaffer that Tom D'Amore had agreed to take care of Mr. Cardell in exchange for Cardell's testimony against the Applicant.

While the Court finds much of Mr. Gregory's testimony and affidavits not credible, the Court does find that his testimony that there was no deal in exchange for Mr. Cardell's testimony to be truthful because the affidavits from Mr. D'Amore and Mr. Barger support this testimony.

The Court finds that Mr. Schaffer having misrepresented himself to Mr. Gregory, it is not inconceivable that Mr. Gregory would have made misrepresentations to Mr. Schaffer.

The Court is familiar with Tom D'Amore and finds him credible and worthy of belief.

The Court is also familiar with David Barger and finds him credible and worthy of belief.

The affidavits of Tom D'Amore and David Barger, and the testimony of Michael Gregory are all consistent that there was no deal or agreement for Mr. Cardell's testimony against the Applicant.

The Court finds there was no deal or agreement made by the State in exchange for Mr. Cardell's testimony against the Applicant.

The Court finds that Mr. Cardell and Mr. Gregory may have operated under a belief or hope that if Mr. Cardell testified for the State he would get leniency, however, such a belief does not constitute an agreement without the State's assent.

The Court is familiar with Phillip Weatherbee and finds him credible and his testimony worthy of belief.

Mr. Weatherbee testified that there was no deal made by Mr. D'Amore in exchange for the testimony of his client, John DeJean, against a defendant in a capital murder case, Abdul Raheem. (RR 59, 62-63).

The Court finds that there has been no showing of a pattern of Mr. D'Amore making deals for leniency in exchange for testimony.

The Court finds that no written or oral agreement was made by Mr. D'Amore in exchange for Mr. Cardell's testimony.

The Court finds that there was no unspoken understanding that Mr. Cardell would receive leniency or have his cases dismissed if he testified against the Applicant.

CONCLUSIONS OF LAW

The Court concludes that the Applicant has failed to meet his burden on his allegations.

The Court finds that since there was no agreement, there was nothing for the State to disclose to defense counsel.

The Court concludes that the accomplice witness, Reginald Cardell, did not commit perjury when he testified there was no agreement.

The Court concludes that the State did not suppress evidence or use perjured testimony as alleged by Applicant.

The Court concludes that the Applicant received a fair trial.

The Court concludes that the Applicant has not been denied due process of law. The Court therefore recommends that relief be denied.

ORDER

The Clerk of the Court is hereby ordered to transmit to the Court of Criminal Appeals in Austin, Texas, certified copies of the writ application, the State's response thereto,

the order designating issues, the affidavits submitted, along with all motions and pleadings filed in this matter, and these findings of fact.

The Clerk is further ordered to send a copy of these findings to counsel for the Applicant, Randy Schaffer, 1301 McKinney, Suite 3100, Houston, Texas, 77010, and to counsel for the State.

SIGNED this 10 day of January, 2005.

/s/ **Karen J. Greene**
KAREN J. GREENE, JUDGE
282nd JUDICIAL
DISTRICT COURT
DALLAS COUNTY, TEXAS